86 - 1411
NO.

Supreme Court, U.S.
FILED
FEB 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

HARRY P. MILLER, JR.,
Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Richard C. Jenkins
1222 Commerce, Suite 503
Dallas, Texas 75202
214-748-5800
ATTORNEY FOR PETITIONER

QUESTION PRESENTED FOR REVIEW

Was petitioner's Fifth Amendment right to an impartial and disinterested civil tribunal violated when the federal district judge allowed petitioner's counsel to withdraw "pursuant to Rule 11" Fed. R. Civ. Pro., then conducted the trial in a prejudicial manner against the *pro se* petitioner?

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties.

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STATEMENT OF JURISDICTION

Petitioner seeks review of the decision of the Court of Appeals, Fifth Circuit. The date of its judgment and time of its entry were October 30, 1986.

The date of the order overruling motion for rehearing was December 1, 1986.

The statute conferring jurisdiction to review the decision by writ of certiorari is 28 U.S.C. §1254(1).

LAW WHICH THE CASE INVOLVES

1. U.S. Constitution, 5th Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in acutal service in time of War or public danger; not shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation. (emphasis added)

2. 28 U.S.C. §2072

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

3. Fed. R. Civ. Pro. No. 11

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one

attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

4. Fed. R. Evid. No. 614(b)

Interrogation by court. The court may interrogate witness, whether called by itself or by a party.

STATEMENT OF THE CASE

In September 1978, petitioner was hired by respondent, Federal Deposit Insurance Corporation, as a trainee assistant bank examiner, then fired for allegedly unsatisfactory work August 17, 1979.

Petitioner alleging his firing was discriminatory filed an administrative complaint and then in due course, an action in federal district court.

Jurisdiction was asserted there under 42 U.S.C. §2000 e-5 and 28 U.S.C. §1343.

The action was filed through counsel, but before trial counsel filed a motion to withdraw and the court granted it.

The federal district judge's order allowing withdrawal, reproduced in the Appendix hereto, recited that during a conference attended by counsel, "counsel for plaintiff explained to the court that pursuant to Rule 11 of the Federal Rules of Civil Procedure, he could not, *consistent with his ethical obligation as an attorney,* represent the plaintiff in this matter." (emphasis added) Then upon that basis the court held there was good cause to allow counsel for plaintiff to withdraw.

About a year after counsel withdrew, the same federal district judge, sitting without a jury, conducted trial on the merits.

Petitioner, the plaintiff therein, was unemployed at the time of trial and represented himself *pro se.*

Respondent was represented by the United States Attorney.

During trial the court in effect conducted the case for petitioner but in the process prematurely cut off cross examination by petitioner, failed to allow petitioner fully to present his case and discontinued the evidence before petitioner was ready to rest.

Since it was a case in which petitioner alleged he was discriminated against by being fired on account of race and religion, the quality of his work was in issue.

Petitioner on several occasions asked the court to require the FDIC to produce examples of his alleged bad audit work but the court never took action on this request, and no example of petitioner's allegedly bad audit work was introduced at trial.

After the federal district court entered judgment for respondent, petitioner appealed *pro se*, and the Court of Appeals for the Fifth Circuit affirmed the decision against him in an unpublished opinion, reproduced in the Appendix hereto.

ARGUMENT

The Court of Appeals in affirming judgment against petitioner has so far sanctioned a departure from the accepted and usual course of judicial preceedings by the federal district court as to call for an exercise of this High and Honorable Court's power of supervision.

In particular, petitioner as a civil litigant is entitled as a matter of due process under the Fifth Amendment to an impartial and disinterested tribunal. *Marshall v. Jerrico Inc.*, 466 U.S. 238, 100 S.Ct. 1610, 64 L.Ed.2d 182 (1980)

Petitioner requests this High and Honorable Court's writ of certiorari because petitioner's constitutional right to an impartial and disinterested tribunal was violated by the trial court's use of Rule 11, Fed. R. Civ. Pro.

Rule 11 as amended April 28, 1983 states that the signature of party or counsel on any paper filed in federal district court constitutes a certificate that "to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose ..."

Therefore, when the federal district court allowed counsel to withdraw "pursuant to Rule 11," the trial court found in effect that the lawsuit was not well grounded in fact or was not warranted by existing law or by a good faith argument for the extension, modification or reversal of the existing law or that the lawsuit was interposed for an improper purpose.

There could be no other content of any finding "pursuant to Rule 11" except the implication of a frivolous or improper lawsuit.

The same federal district judge who in allowing counsel to withdraw found the lawsuit either groundless or interposed for an improper purpose, conducted the trial

sitting without a jury and faced the petitioner, acting *pro se*.

In trial, the judge not only interrogated witnesses, as was acceptable under Fed. R. Evid. No. 614(b). He went further and conducted petitioner's entire case, decided when cross-examination should cease and when petitioner should rest.

The result was a foregone conclusion. The federal district judge had already on counsel's motion to withdraw determined the lawsuit was groundless or improper, and he did so again at trial. Another judge should have presided.

This High and Honorable Court has the power to prescribe the rules of procedure for the district courts, but "Such rules shall not abridge, enlarge or modify any substantive right..." 28 U.S.C. §2072.

Petitioner knows as this Court does that Rule 11, Fed. R. Civ. Pro., should not and was not intended to abridge constitutional rights, yet that is precisely the result of its use here.

"The due process clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 100 S.Ct. 1610, 64 L.Ed.2d 182 (1980), 64 L.Ed.2d at page 188.

As the court there said, the requirement of neutrality has been jealously guarded by this High and Honorable Court.

For example, the United States Supreme Court has prohibited the contempt trial of a defendant before the judge who brought the contempt charge. *Taylor v. Hayes,* 418 U.S. 488, 98 S.Ct. 2697, 41 L.Ed.2d 897 (1974) (Judge Hayes sentenced lawyer Taylor to jail for comtempt committed before Judge Hayes.)

Can it be said that petitioner presented his case to the federal district court with assurance that the arbiter was not predisposed to find against him? The question answers itself. No.

How could the same judge who allowed counsel to withdraw from representing petitioner on the grounds the lawsuit was groundless or improper, possibly be fair to petitioner *pro se* in judging the merits of the same lawsuit?

In re Murchison, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955) involved a Michigan system of one-man grand jury where a judge acting as a grand jury brought charges against witnesses for contempt, then tried the charges.

This High and Honorable Court in the course of determing this was a denial of due process stated the following at 99 L.Ed. 946: "A fair trial in a fair trbunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered."

The one-man grand jury and judge in the *Murchison* case had an interest in finding valid the charges he himself had brought.

Judge Hayes had an interest in sustaining the validity of the contempt charges he himself had brought against lawyer Taylor during a long hot trial.

Our Honorable District Judge below had a similar interest in finding valid his previous holding that the lawsuit by petitioner was groundless or improper.

This petitioner, under the due process clause of the Fifth Amendment to the Constitution of the United States, was entitled to an impartial and disinterested tribunal in this civil case. He did not get one.

Instead he got the mere form of a trial without the substance thereof, a "courtesy trial" if you will. The outcome had been predetermined without benefit of evidence long before in the judge's private chambers. (See order allowing withdrawal in Appendix.)

Did the federal district judge below hold the balance nice, clear and true? [Question adapted from *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. ____, 106 S.Ct. ____, 89 L.Ed.2d 823 (1986)] The answer is negative. The decision should be reversed to allow petitioner a true trial.

Petitioner a layman appeared *pro se* both in trial and appeal, so he should not be held waived or intentionally relinguished any right guaranteed by our Constitution. Petitioner first asserts here his constitutional right to an impartial tribunal and asks this Court's grace because

petitioner was previously unaware this right had been violated.

The misunderstanding and misuse of Rule 11 by the federal district judge here can be corrected by this High and Honorable Court and can be used to educate the many federal district judges in the land who either misuse Rule 11 or overuse it.

Petitioner invites the court to take judicial notice of the many headlines every month in which federal district judges are using Rule 11, sometimes well, sometimes ill.

Thus the importance of this case to petitioner, deprived of his Fifth Amendment due process right to an impartial tribunal, joins with the public importance of the federal trial bench understanding properly the use of Rule 11 Federal Rules of Civil Procedure.

This High and Honorable Court has not written, petitioner believes, upon Rule 11 Federal Rules of Civil Procedure.

Petitioner asks this court to correct the injustice to him and issue an opinion on the proper use of Rule 11.

CONCLUSION

Petitioner prays that this petition for writ of certiorari be granted, that a writ of certiorari issue from this High and Honorable Court to review the decision of the Court of Appeals for the Fifth Circuit, that the decision of said court be reversed, and that petitioner be granted a new trial.

Richard C. Jenkins
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Dallas, Texas 75202
214-748-5800
Attorney for Petitioner

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this Petition for Writ of Certiorari was served on opposing counsel by mail, certified return receipt requested, to Assistant U.S. Attorney Wayne Hughes, care of Honorable Marvin Collins, U.S. Attorney, 310 U.S. Courthouse, Ft. Worth, Texas, 76102, on February 27, 1987, by

Attorney for Petitioner

APPENDIX

Order allowing counsel to withdraw.....A-1

District court memorandum opinion.....A-2

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Filed May 13, 1985

HARRY P. MILLER, JR.	‡	CIVIL ACTION
	‡	
VS.	‡	No.
	‡	
FEDERAL DEPOSIT INSURANCE CORP.	‡	4-83-229-E

ORDER

Counsel for plaintiff filed a motion to withdraw as counsel of record. Submitted in support of this motion was an affidavit signed by the plaintiff. During a conference with the Court at which counsel for defendant and the plaintiff were present, counsel for plaintiff explained to the Court that pursuant to Rule 11 of the Federal Rules of Civil Procedure, he could not, consistent with his ethical obligation as an attorney, represent the plaintiff in this matter. Therefore, it appearing to the Court that there is good cause to excuse counsel for plaintiff from this lawsuit, it is hereby ORDERED that counsel for plaintiff motion to withdraw as attorney of record be GRANTED.

Signed this 13th day of MAY, 1985.

/s/ Eldon B. Mahon

ELDON B. MAHON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Filed May 9, 1986

HARRY P. MILLER, JR.	‡	CIVIL ACTION
VS.	‡	No.
FEDERAL DEPOSIT INSURANCE CORP.	‡	4-83-229-E

MEMORANDUM OPINION

Plaintiff, Harry Miller, Jr., a white Catholic male brings this action *pro se,* alleging that Defendant, Federal Deposit Insurance Corp. ("FDIC") discriminated against him in employment on the basis of race, religion and national origin; in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* Defendant denies that it discriminated against plaintiff in any way. This case came for trial before Court on April 28, 1986. Having considered all the evidence and the arguments of both plaintiff and counsel for the defendant, the Court now makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

1. Plaintiff, Harry P. Miller, Jr., is a white Catholic male resident of Tarrant County, Texas.

2. Defendant, Federal Deposit Insurance Corporation, is an independant federal agency and department of the United States of America.

3. On September 25, 1978, plaintiff was employed as a Bank Examiner (Trainee) for a one year probationary period in the Fort Worth Field Office.

4. Carlos R. Johnson was the supervisor of the Fort Worth Field Office of the FDIC at the time plaintiff worked there.

5. After reviewing plaintiff's specific job performance, Johnson would rate plaintiff's overall job performances.

6. On February 26, 1979, Johnson rated plaintiff's performance unsatisfactory in four of the six job characteristics.

7. On June 25, 1979, Johnson rated plaintiff's performance unsatisfactory in all six job characteristics.

8. Plaintiff was terminated during his probationary period, effective August 17, 1979.

9. Based on the testimony at trial and the exhibits admitted into evidence, the Court finds that plaintiff was not terminated on the basis of his race, religion or natural origin.

10. Any finding of fact that should be a conclusion of law is hereby made a conclusion of law.

Conclusions of Law

1. This Court has jurisdiction over the subject matter of this action pursuant to 42 U.S.C. § 2000e-5 and 28 U.S.C. § 1343. Venue is proper in the Northern District of Texas.

2. Defendant, FDIC, is an employer within the meaning of 42 U.S.C. § 2000e(b).

3. Plaintiff filed a timely administrative complaint more than 180 days prior to filing this action. Therefore, this action is authorized by 42 U.S.C. § 2000e-16(c).

4. In a Title VII case, plaintiff has the burden of establishing a prima facia case of employment discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). To establish a prima facia case of discrimination under Title VII in a discharge situation, the plaintiff must show (1) that he belongs to a protected group; (2) that he was discharged; (3) that he was qualified to perform the work; and (4) after he was discharged, FDIC filled his position with a nonminority. *Mark v. Prattco, Inc.* 607 F.2d 1153, 1155 (5th Cir. 1979).

If the plaintiff proves a prima facia case, the burden then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employment decision. The defendant's burden is relatively light, in that "the defendant need not persuade the court that it was actually motivated by the proferred reasons . . . it is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

If the defendant does not present sufficient evidence to raise a genuine issue of fact as to whether it discriminated, the plaintiff prevails. If the defendant does succeeed in rebutting the presumption of discrimination, the burden shifts back to the plaintiff to show that the defendant's stated reason was a pretext for discrimination. He may prove this by evidence that his race, religion or

natural origin played an impermissible role in the employment decision or by showing that the nondiscriminary reasons offered are not credible. *Lincoln v. Board of Regents - University System*, 697 F.2d 928, 938 (11th Cir. 1983).

5. The Court finds that plaintiff has not established a prima facia case under Title VII because he presented no evidence at trial that (1) he belongs to a protected group and (2) that after he was discharged, FDIC filled his position with someone not in a protected group. Whereas some courts do not require evidence regarding replacement, the Fifth Circuit does require such a showing. *See Price v. Maryland Casualty Co.*, 561 F.2d 609 (5th Cir. 1977); *but see Hayden v. Rand Corp.*, 605 F.2d 453 (9th Cir. 1979); *Lobb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979).

6. The Court further finds that FDIC is not "that unusual employer who discriminates against the majority" which would enable plaintiff as a member of a majority, to establish a prima facia case for intentional disparate treatment. *See Parker v. Baltimore & Ohio Railroad*, 652 F.2d 1012, 1017 (D.C. Cir. 1981).

7. Despite the findings in Nos. 5 and 6 above, the Court goes on to find that FDIC successfully rebutted plaintiff's case by articulating a legitimate, nondiscriminatory reason for its decision to terminate plaintiff. *McDonnell Douglas Corp.*, 411 US. 792. The evidence presented clearly shows that plaintiff's overall performance during his probationary period was unsatisfactory.

8. Plaintiff has not met his burden in showing that FDIC's profferred reason was just a pretext for discrimination. *Texas Department of Community Affairs*, 450 U.S. 248.

9. It is axiomatic that under the statutory scheme of Title VII, an employer may make an employment decision for a good reason, for a bad reason, or no reason at all as long as discriminatory distinctions do not influence the decision. *Tims v. Board of Education of McNeil, Arkansas,* 452 F.2d 551, 552 (8th Cir. 1971). There is no evidence that discriminatory motives entered into FDIC's decision regarding plaintiff. On the contrary, the evidence overwhelmingly reveals that FDIC terminated plaintiff solely based on his work performance during his probationary period. Plaintiff has not shown that FDIC violated the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*

10. Defendant has asked to be awarded attorney's fees. under the standard in *Christianburg Garment Co. v. EEOC,* 434 U.S. 412 (1978), a defendant may receive attorney's fees if the plaintiff's suit is found to be frivolous, groundless or unreasonable. Under the circumstances of this case, the Court finds that defendant should not be awarded his attorney's fees.

11. Any conclusion of law that should be a finding of fact is hereby made a finding of fact.

A judgment will be entered accordingly.

Signed this 9th day of MAY, 1986.

/s/ Eldon B. Mahon

ELDON B. MAHON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Filed May 9, 1986

HARRY P. MILLER, JR.	‡	CIVIL ACTION
	‡	
VS.	‡	No.
	‡	
FEDERAL DEPOSIT INSURANCE CORP.	‡	4-83-229-E

JUDGMENT

This action came on for trial before the Court, Honorable Eldon B. Mahon, United States District Judge, sitting without a jury. The issues having been duly heard, and the Court having rendered an opinion, it is ORDERED and ADJUDGED that plaintiff, Harry P. Miller, Jr., take nothing and that this action be dismissed on the merits. Each party is to bear his own costs of action.

Entered this 9th day of May, 1986.

/s/ Eldon B. Mahon

ELDON B. MAHON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-1405
Summary Calendar

(D.C. Docket No. CA-4-83-229-E)

HARRY P. MILLER, JR.

Plaintiff-Appellant,

versus

FEDERAL DEPOSIT INSURANCE CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas

(October 30, 1986)

BEFORE POLITZ, WILLIAMS, and JONES, Circuit Judges.

EDITH H. JONES, Circuit Judge:*

Appellant, Harry P. Miller, Jr., appeals pro se from a final judgment of the district court in favor of appellee, Federal Deposit Insurance Corporation (FDIC), in a case of alleged employment discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5. We AFFIRM.

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Miller, a white Catholic male, was hired on September 25, 1978 to work in the Fort Worth field office of the FDIC as a bank examiner (trainee) for a one year probationary period. During Miller's probationary period the Fort Worth field office was supervised by Charles R. Johnson. Johnson filled out a job evaluation form on Miller on four separate occasions between October 27, 1978 and June 25, 1979. The first form evaluated Miller's performance from October 27, 1978 through January 23, 1979. Johnson had written on the job evaluation form that Miller was "able to complete only a few tasks satisfactorily without assistance." Further, Johnson testified that during this period Miller "was not a satisfactory employee." The second job evaluation form was dated March 16, 1979. Concerning Miller's performance as of that date, Johnson testified that it was "not satisfactory and that [Miller's] growth potential was unsatisfactory. I stated on [the job evaluation form] that trainee Miller's rate of learning and job performance remains unreasonably slow." The third job evaluation form, dated April 3, 1979, was similarly negative. On the fourth job evaluation form, dated June 25, 1979, Johnson wrote: "Miller is one of the worst trainee assistant examiners that I have experienced in over 23 years with the corporation. He should be terminated immediately." In addition to the above-described forms, the FDIC offered into evidence a memo from Johnson to the FDIC regional director which outlined a conversation that Johnson had with Miller on April 27, 1979. In that conversation Johnson informed Miller that his performance was unsatisfactory and that he should begin to look for a new job. Johnson testified that during the conversation Miller never mentioned that he felt he was being discriminated against on the basis of sex, religion, or race. Miller was terminated during his probationary period, effective August

17, 1979, according to Johnson, "[s]olely because he was incompetent." Miller contends his termination was "due to prejudices, racial prejudicies, religious and primarily ethnic prejudice." Miller also suggested he was discriminated against on account of his sex. When asked what his race was, Miller replied: "I am a descendent of Plantagenets, Spanish, French, European, Mongolian, African." When asked about his color, Miller replied: "I'm mostly white." Miller's employment records showed he is caucasian. Miller further testified that he has "African and Mongolian blood." When asked if he felt he was terminated because of his African blood, Miller replied: "Because I didn't display the accepted prejudices in the office." When asked how he was discriminated against on account of race, Miller testified that his "work papers," when checked against the job evaluation forms filled out by his supervisor, show that the information on the job evaluation forms was falsified. According to Miller, the information was falsified because Miller refused to subscribe to his supervisor's anti-African sentiments. When asked how his religious beliefs led him to be terminated, Miller replied: "I believe that murder is immoral and that a government that advises it, as yours has in the field manual on warfare and psychological operations, would not --." Miller went on to state that the director of the FDIC was a protege of former President Lyndon Johnson, "who ordered the murder of his own officers in Viet Nam."

Regarding ethnic prejudice, Miller testified that he was discharged "[b]ecause I have ethnic principles that my forefathers developed and put into force in the United States, actually in the colonies of Virginia and so on."

Further, Miller stated: "My forefathers before have very specific ethnic principles that were written into our constitution and so on, some of your citizens aren't very happy with their Constitution. You will notice you are sitting under the fascist symbol in here."

Miller offered nothing beyond bare assertions in support of his contention that he was discriminated against on account of his sex.

The sum and substance of Miller's argument is that the job evaluation forms filed out by his supervisor were falsified because Miller refused to subscribe to the prejudicial beliefs and attitudes of his co-workers.

The three-stage analysis for evaluating Title VII claims, as set out in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), "is not the proper vehicle for evaluating a case that has been fully tried on the merits." *Williams v. Southwestern Bell Telephone Co.,* 718 F.2d 715, 717 (1983).

> [Instead, the district court's function in such a case] is to decide the ultimate factual issue in the case: whether or not there was intentional discrimination against the plaintiff in violation of Title VII. On this issue, the plaintiff has the burden of persuasion, which [he may meet "either directly by persuading the court that a discriminatory reason more likely motivated the

> employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." . . . In either case, the trier of fact must then determine which explanation, employer's or employee's, is the more persuasive.

Id. (quoting *Texas Dep't of Community Affiars v. Burdine*, 450 U.S. 248, 256, 101 S.Ct. 1089, 1095, 67 L.Ed.2d 207 (1981); *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1983)). "Because the ultimate issue, that of discrimination *vel non*, is to be treated by district and appellate courts in the same manner as any other issue of fact, . . . our review is subject to the 'clearly erroneous' standard of *Fed. R. Civ. P.* 52(a)." *Id.* at 718 (citations omitted). "[T]hat standard provides that '[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.*

Applying these principles to the instant case, we find that the district court's holding was not clearly erroneous. Miller offered into evidence nothing beyond bare assertions to show that his employment was terminated for discriminatory reasons. The overwhelming evidence shows that Miller was terminated solely on the basis of his performance.

The district court's judgment is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-1405

Filed December 1, 1986

HARRY P. MILLER, JR.
Plaintiff-Appellant,

versus

FEDERAL DEPOSIT INSURANCE CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas

ON PETITION FOR REHEARING
(October 30, 1986)

BEFORE POLITZ, WILLIAMS, and JONES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby **DENIED.**

ENTERED FOR THE COURT:

/s/ Edith H. Jones 11/26/86
UNITED STATES CIRCUIT JUDGE